IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4349 of 2001
with
CIVIL APPLICATION NO. 3188 OF 2002
IN
SPECIAL CIVIL APPLICATION NO. 4349 OF 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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GUJARAT STATE LAND DEVELOP CORPN LTD
Versus
SOMPURA DHARMEDNRA HATHI C/O SD RATHOD

Appearance:
1. Special Civil Application No. 4349 of 2001
MR HS MUNSHAW for Petitioner No. 1
MR KISHOR M PAUL for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 23/04/2002

ORAL JUDGEMENT

Heard learned advocate Mr. Munshaw for the petitioner and Mr. Paul for the respondent workman. By way of this petition, the petitioner has challenged the award made by the labour court, Bhuj in Reference No. 1490 of 1988 dated September, 2000 wherein the labour court has granted reinstatement while setting aside the order of termination with continuity of service with thirty per cent of the back wages for the intervening period.

In this petition, rule was issued by this Court and interim relief in terms of para 8(C) was granted by order dated 1st August, 2001. Affidavit in reply to the present petition has been filed by the respondent workman.

Learned advocate Mr. Munshaw has submitted that the respondent was working on 3rd July, 1987 and his service was terminated on 1st April, 1988; that the respondent was working on ad.hoc and daily rated basis subject to availability of work and as and when the work was available, he was called by the corporation and he has completed only 204 days service and has not completed 240 days and, therefore, there was no necessity to comply with the provisions of section 25-F of the Industrial Disputes Act, 1947. He has submitted that no juniors have been continued or retained while terminating the services of the petitioner; as per the Government resolution, the project has come to an end on 23rd July, 1988 and, therefore, services of the respondent were terminated. On the basis of these submissions, he has submitted that the labour court has committed gross error in coming to the conclusion that section 25-F is required to be followed by the petitioner. He has submitted that the labour court has also committed an error in calculating weekly off and other holidays for the purpose of calculation of 240 days. He has further submitted that the labour court has also committed gross error in not considering the documentary evidence produced by the petitioner. He has further submitted that the respondent was working as daily wager and the respondent has voluntarily stopped to report for duty from 1st April, 1988 and, therefore, there was no question of terminating his services. He has submitted that the daily wager is not entitled to any amount of back wages since work was being taken from him subject to availability of work and therefore, award made by the labour court is required to be quashed and set aside.

Learned advocate Mr. Paul appearing for the respondent has submitted that it is not in dispute that

the respondent was appointed as daily wager employee on 3rd July, 1987 and worked for a period upto 31st March, 1988 and during that period, he worked for a period upto 204 days' service but at that time, the corporation has not included weekly off and other holidays while calculating 240 days and if such weekly off and other holidays would have been calculated, then, the petitioner would have come to the conclusion that the respondent has completed 240 days' work continuously. Thus, according to his submission, taking the Sundays and statutory days into account the calculation made by the labour court is correct. He has submitted that the said aspect has rightly been considered by the labour court. As regards the award of back wages, he has submitted that the labour court has considered the question of back wages keeping in view the pendency of the proceedings before the labour court and after taking into account period of 12 years, the labour court has granted only 30 per cent back wages and, therefore, the labour court has not committed any error even in granting back wages to the extent of 30 per cent alone.

After the submissions of Mr. Paul, learned advocate Mr. Munshaw has made submissions in rejoinder that the petitioner has also filed rejoinder wherein the question has been raised that the respondent has worked as daily wager in a particular scheme which was created by the Central Government and he was not regularly selected employee. He has submitted that the resolution of the State Government dated 23rd March, 1988 was placed on record at Exh. 36 by the petitioner wherein regular employees have been shifted back to their original place and no daily rated employees have been continued in service with the corporation and in view of the closure of the scheme, services of such daily rated employees have come to an end and, therefore, there is no scope for reinstatement of the respondent as the corporation is now not having any scheme; no work is available and no funds are available with the corporation. He has also submitted that the respondent was being engaged subject to availability of work and, therefore, there was no work continuously performed by the workman and therefore, in such a situation, in lieu of reinstatement, some compensation can be awarded to the respondent workman if at all the Court comes to the conclusion that there was non compliance of section 25-F of the Industrial Disputes Act, 1947 but reinstatement cannot be granted to the respondent workman.

I have considered the submissions made by both the learned advocates. Respondent has challenged the

action of termination of his service on 1st April, 1988 before the labour court by raising industrial dispute in the year 1988 and the reference was made for adjudication on 13th June, 1988. Before the labour court, statement of claim was filed by the respondent at Exh.4 and the written statement thereto was filed by the corporation at Exh.8 and, thereafter, the petitioner corporation has produced documentary evidence vide Exh. 9 wherein details have been given as regards actual working days of the respondent for the period from July,1987 to March, 1988. Alongwith that, pay register as also the Government resolution dated 23rd March, 1988 has also been produced by the corporation vide Exh. 36. Respondent has produced certain documents vide list Exh. 30 and then, the respondent was examined at Exh. 23 and his evidence has been closed vide purshis Exh.24. Thereafter, witness for the petitioner namely Bhaskar Shivprasad Vora has been examined at Exh. 25 and the oral evidence has been closed vide purshis Exh. 37. Thereafter, the labour court heard the matter on merits and has considered the submissions of both the learned advocates. The labour court has considered the evidence of the petitioner corporation that as per the Government Resolution dated 23rd March, 1988, the work has come to an end and, therefore, the labourers are not reporting for work and, therefore, there was no termination made by the corporation since because of the closure of the office, the respondent has not been reporting for work and the respondent has completed 204 days continuous work. In light of this defence of the petitioner, the labour court examined the documentary evidence produced vide list Exh. 9 which has been exhibited as Exh. 10 to Exh. 29 wherein muster roll has been produced by the corporation for the period from March, 1987 to March, 1988 which comes to 204 days continuous work. Thus, as per the case of the petitioner itself, the respondent has actually worked for 204 days and thereafter, the labour court has considered that in calculating these 204 actual working days, the petitioner has not taken into account the weekly off and other holidays and the labour court was of the view that if such weekly off and other holidays would have been taken into consideration, then, the respondent would have been completing more than 240 days continuous work within 12 months preceding the date of termination, as per the decision of the apex court in case of Workmen of American Express International Banking Corporation versus Management of American Express International Banking Corporation reported in AIR 1986 SC 458. The labour court has also come to the conclusion that the petitioner corporation has not produced relevant and important document of muster roll and pay register

before this court and only statement of working days has been produced by the corporation and, therefore, considering these facts, the labour court has further come to the conclusion that after considering the actual working days of 204 and if weekly off and other holidays are included in these 204 actual working days, then, it would be more than 240 days continuous service rendered by the respondent workman and on the basis of such conclusion, the labour court has come to the conclusion that there was non compliance of section 25-F of the Industrial Disputes Act, 1947 and in view of such non compliance of section 25-F of the Act, the order of termination of service was required to be quashed and set aside.

The labour court has considered the defence of the petitioner that in view of the Government Resolution dated 23rd March, 1988 produced by the Corporation at Exh.36, the unit has been closed. In para 3 of the said resolution, fact of closure of the unit has been mentioned. In para 3 of the said resolution, it has been resolved that the Managing Director of the Gujarat Land Development Corporation should follow active for placement of staff, if necessary, in consultation with the Director of Agriculture and Agriculture section of the said Department. In view of this, the labour court has raised question as to whether the respondent herein has been discharged in consultation with the Director of Agriculture or not and has come to the conclusion that the petitioner has completely failed to prove that the respondent has been discharged in consultation with the said authority and in view of this, the labour court has found that the termination of service of the respondent workman was violative of section 25-F of the Industrial Disputes Act, 1947 and as such, it was null and void. After coming to such conclusion, the labour court examined the question of back wages. While considering the aspect of back wages, the labour court kept in mind the pendency of proceedings for about 12 years and after considering the evidence of the respondent workman, the labour court has granted back wages to the extent of 30 % for the intervening period.

The contention has been raised by the petitioner corporation that the respondent workman has not completed 240 days continuous work but has worked only for 204 days and, therefore, there was no question of complying with section 25-F of the Industrial Disputes Act, 1947. This aspect has been examined by the apex court in case of Workmen of American Express International Banking Corporation versus Management of American Express

International Banking Corporation reported in AIR 1986 SC 458 and has observed as under in para 5 and 6 of the report :

"5. Section 25-F of the Industrial Disputes Act is plainly intended to give relief to retrenched workmen. The qualification for relief under S. 25-F is that he should be a workman employed in an industry and has been in continuous service for not less than one year under an employer. What is continuous service has been defined and explained in section 25-B of the Industrial Disputes Act. In the present case, the provision which is of relevance is S. 25-B (2)(a)(ii) which to the extent that it concerns us, provides that a workman who is not in continuous service for a period of ne year shall be deemed to be in continuous service for a period of one year, if the workman during a period of twelve calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than 240 days. The expression which we are required to construe is actually worked under the employer. This expression, according to us, cannot mean those days only when the workman worked with hammer, sickle or pen but must necessarily comprehend all those days during which he was in the employment of the employer and for which he had been paid wages either under express or implied contract of service or by compulsion of statute, standing orders etc. The learned counsel for the management would urge that only those days which are mentioned in the Explanation to S. 25-B(2) should be taken into account for the purpose of calculating the number of days on which the workman had actually worked though he had not so worked and no other days. We do not think that we are entitled to so constrain the construction of the expression 'actually worked under the employer.' The explanation is only clarificatory, as all explanations are, and cannot be used to limit the expanse of the main provision. If the expression 'actually worked under the employer' is capable of comprehending the days during which the workman was in employment and was paid wages and we see no impediment to so construe the expression - there is no reason why the expression should be limited by the explanation. To give it any other meaning then what we have

done would bring the object of sec. 25-F very close to frustration. It is not necessary to give examples of how S. 25-F may be frustrated as they are too obvious to be stated.

6. The leading authority on which reliance was placed by the learned counsel for Management was Lalappa Lingappa v. Laxmi Vishnu Textiles Mills Ltd. (AIR 1981 SC 852). We may straightway say that the present question whether Sundays and paid holidays should be taken into account for the purpose of reckoning the number of days on which an employer actually worked, never arose there. The claim was under the Payment of Gratuity Act. All permanent employees of the employer claimed that they were entitled to payment of gratuity for the entire period of their service, that is, in respect of every year during which they were in permanent employment irrespective of the fact whether they had actually worked for 240 days in a year or not. The question there was not how the 240 days were to be reckoned the question was not whether Sundays and paid holidays were to be included in reckoning the number of days on which the workmen actually worked; but the question was whether a workman could be said to have been actually employed for 240 days by the mere fact that he was in service for the whole year whether or not he actually worked for 240 days. On the language employed in s. 2(c) of the Payment of Gratuity Act, the Court came to the conclusion that the expression 'actually employed' occurring in Explanation I meant the same thing as the expression 'actually worked' occurring in Explanation II and that as the workmen concerned had not actually worked for 240 days or more in the year they were not entitled to payment of gratuity for that year. The further question, as to what was meant by the expression 'actually worked' was not considered as apparently it did not arise for consideration. Therefore, the question whether Sundays and other paid holidays should be taken into account for the purpose of reckoning the total number of days on which the workmen could be said to have actually worked was not considered in that case. The other cases cited before us do not appear to have any bearing on the question at issue before us."

Recently also, this aspect has been examined by the Rajasthan High court in case of Executive Engineer, PHED & Ors. versus Manoj Kumar & Another reported in 2000 II CLR 583 wherein the Rajasthan High Court has, after considering the decision of the apex court in case of Workmen of American Express International Banking Corporation versus Management of American Express International Banking Corporation reported in AIR 1986 SC 458 : 1985 II CLR 269 and has observed as under in para 4 and 5 of the judgment :

> 4. The proposition cannot be accepted in the face of the decision of the Supreme Court in WOrkmen of American Express International Banking Corporation v. Management of American Express International Banking Corporation 1985 II CLR 269 SC In paragraph 5 of their judgment, their Lordships have clearly observed that the expression 'actually worked under the employer' cannot mean those days only when the workman worked with hammer, sickle or pen but must necessarily comprehend all those days during which he was in the employment of the employer and for which he had been paid wages either under express or implied contract of service or by compulsion of statutes, standing orders etc.
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> 5. Thus, taking the Sundays and statutory days into account the calculation made by the labour court is correct. Moreover the petitioner has not taken this point in the petition itself and has not contested that the respondent has completed 240 days of working. No other point was raised before me. "

Therefore, in view of the aforesaid observations made by the apex court, the labour court was right in calculating weekly off and other holidays while calculating the period of actual employment of the respondent and actual working of the respondent workman.

Recently, said question has been examined by the Allahabad High Court in case between Prathma Bank and Presiding Officer, Central Government Industrial Tribunal cum Labour Court, Pandu Nagar, Kanpur, reported in [2002 (93) FLR 197]. In para 3 and 4 of the said decision, it has been observed by the Allahabad High Court as under:

> "3. In this part of the award, which is challenged by the employer inter alia on the ground that in paragraph 7 of the award, the date

of engagement in the second spell i.e. 23.7.1989 i.e. date of termination 22.4.1988, is not disputed by either side. The Industrial Tribunal cum Labour Court has also referred that it is admitted that between these two dates the total workings days come to 275 days. The workman has contended that the Labour Court came to the conclusion that between two dates, namely the date of engagement and the date of termination, the total working days come to 275 days. The employer has not given the number of days in their statement. In the written statement filed by the workman, the workman has stated that he has worked 275 days. The witness of the employer Shri S.K. Chandra has stated that the workman has worked 207 days during the aforesaid two dates. This aspect has been sought to be corrected belated from the payment vouchers Ext. W-I to Ext. W-I 5. Respondent No. 1, the Labour Court came to the conclusion that even without entering into the disputed fact, on the basis of admitted facts, the management version of 207 days working counted by employer is excluding the holidays. The respondent No.1 relied upon the decision in the case of H.P. Singh v. Reserve Bank of India, in which it has been held that the Sunday and other Holidays are to be included within the definition of continuous service as defined under section 25-B(2) read with section 25 (1) of the Industrial Disputes Act, 1947, therefore, the contention of the employer was rightly rejected by the Labour Court that the respondent workman had worked only 207 days thus the finding arrived at by the Labour Court that the respondent workman has worked more than 240 days, cannot be assailed and therefore is to be accepted.

4. The next contention of the learned counsel for the petitioner is that in view of the decision reported in Himanshu Kumar Vidyarthi and others v. State of Bihar and others since the workmen in the aforesaid case were daily wagers, their services stand terminated in terms of contract of employment, thus, the ground that they are not covered by the definition of retrenchment as defined after 1984 amendment of Industrial Disputes Act, 1947, cannot be accepted. In this case of UP State Sugar Corporation v. Om Prakash Upadhyaya, the apex court dealing with the daily wagers, opined that

> once the Labour Court comes to the conclusion that the workman has worked for more than 240 days in the preceding year and Labour Court having come to the conclusion that the termination is without complying with the provisions of Section 25-F or Section 6-N of UP Industrial Disputes Act, 1947, this makes the termination per se illegal, then, the workman would be entitled for back wages and re-instatement from the date of termination itself."

Mr. Munshaw in rejoinder has contended that the closure of the scheme by the Central Government has resulted in termination of the respondent workman; the moment the project would come to an end, then, the services of the respondent would not be required and, therefore, provisions of section 2(oo)(bb) of the Industrial Disputes Act, 1947 would be attracted and, therefore, such termination of the respondent workman would not amount to retrenchment and, therefore, section 25-F of the Industrial Disputes Act, 1947 and, therefore, the labour court has committed gross error in holding that there was no compliance of section 25-F of the Act. The next contention has been that the respondent has worked as daily wager in a particular scheme which was created by the Central Government and he was not regularly selected employee. He has submitted that the resolution of the State Government dated 23rd March, 1988 was placed on record at Exh. 36 by the petitioner wherein regular employees have been reverted back to their original place and no daily rated employees have been continued in service with the corporation and in view of the closure of the scheme, services of such daily rated employees have come to an end and, therefore, there is no scope for reinstatement of the respondent as the corporation is now not having any scheme; no work is available and no funds are available with the corporation. He has also submitted that the respondent was being engaged subject to availability of work and, therefore, there was no work continuously performed by the workman and therefore, in such a situation, in lieu of reinstatement, some compensation can be awarded to the respondent workman if at all the Court comes to the conclusion that there was non compliance of section 25-F of the Industrial Disputes Act, 1947 but reinstatement cannot be granted to the respondent workman.

I have considered the submissions made by Mr.

Munshaw in rejoinder. As regards his first contention about application of the provisions of section 2(oo)(bb) of the Act and as a consequence thereof, action would not amount to retrenchment and, therefore, there would be no application of section 25-F of the Act, it should be noted that there was no written order issued by the petitioner to the respondent workman; no specific contention to that effect has been raised in the written statement and no such oral evidence led and no such submission has been made before the labour court and, therefore, in absence of such specific contention that the appointment of the respondent workman is only in a particular scheme and for a particular period, provisions of section 2(oo)(bb) cannot be made applicable for want of establishment of periodical appointment in a particular scheme. As regards the second contention that as per the State Government Resolution at Exh.36 dated 23rd March, 1988, only regular employees have been shifted back to their original department and no daily rated employees have been shifted to other place, the question was examined by the labour court. Before the labour court, the question was whether the termination of the respondent workman was legal and valid or not. This question has rightly been examined by the labour court and the labour court was right in coming to the conclusion that if the weekly off and other paid holidays are included in actual working days of 204, then, it would come to about 240 days or more and, therefore, the order of termination would become ab initio void and illegal in view of the non compliance of the mandatory provisions of section 25-F of the Industrial Disputes Act, 1947. This view has been taken by the Division Bench of this Court in case of M.P. Ramanandi v. Gujarat State Warehouding Corporation reported in 1985 (2) GLR page 1040. In para 3 of the said judgment, it has been observed by the Division Bench of this Court as under :

"3. Inasmuch as we have already held that the respondent has not followed the condition requisite for terminating the service of the petitioner herein the order of termination Exh. 30 is ab initio void and hence the Labour Court is completely in error when it accepted the order of termination and directed the payment of retrenchment compensation as the only relief the petitioner is entitled to have. Such an order of the Labour Court, in our opinion, is without jurisdiction and contrary to law laid down by the Industrial Disputes Act, and hence this Court has ample jurisdiction to interfere with such

patently erroneous and illegal order for the purpose of giving relief to the petitioner herein. Mr. Trivedi submitted that the matter may be remanded to the Labour Court for the purpose of determining the amount payable as backwages. We do not think that this argument can be countenanced inasmuch as no contention has been taken in the written statement that he was actually engaged in some other job during this period and inasmuch as the order passed under Exh.30 is ab initio void."

Next is the contention of Mr. Munshaw that there is no scope for reinstatement of the respondent in view of the closure of the unit and since no such scheme is available, no work is available, no funds are available. This aspect has been considered by the Division Bench of this Court in case of Gram Panchayat, Damnagar v. Sharadkumar D. Acharya reported in 1994 (1) GLR 579. In para 6 and 7 of the report, it has been observed by the Division Bench of this Court as under:

"6. Thirdly, it is submitted that the post has been abolished and, therefore, reinstatement could not have been granted. It is true that the Panchayat had abolished the post as a measure of economy and terminated the services of the workman. However, the Panchayat did not fulfil the requirements of sec. 25-F and, therefore, termination is illegal and void and he has to be reinstated and, if necessary, the post has to be re-created to comply with the order of reinstatement. It is not open to an employer to contend that since the employer had abolished the post, the order of reinstatement could not be complied with. It would amount to giving licence to the employer to illegally terminate the services and to render the Court helpless in granting reinstatement. That would be perpetuating illegality and injustice. Therefore, petitioner's third contentions has no merit.

7. Lastly, it was submitted that because of the precarious financial condition of the Panchayat, the backwages should not have been awarded. Once it is held that the condition precedent has not been followed, the termination is void and ineffective and the workman is deemed to be continuing in service and entitled to backwages. The reason given of poor economic

condition of the employer is not substantiated factually and is not of any avail legally."

In view of the aforesaid principles laid down by the Division Bench of this Court in aforesaid decisions, the contention raised by Mr. Munshaw has no substance and same is, therefore, rejected.

In view of the above discussion, and also considering the observations made by the apex court as well as the Rajasthan High Court, Allahabad High Court and the Division Bench of this Court in the aforesaid decisions, according to my opinion, the view taken by this Court is quite correct and the labour court was right in considering weekly off and other holidays while considering actual working days and period of actual employment. The labour court was also right in coming to the conclusion that there was breach of section 25-F of the Industrial Disputes Act and was, therefore, right in making an award of reinstatement in favour of the respondent workman.

While passing the award of reinstatement with continuity of service, the labour court has granted back wages to the extent of thirty per cent for the intervening period. During the course of hearing, learned advocate Mr. Paul appearing for the respondent workman has submitted that the respondent is prepared to forego the back wages awarded by the labour court and has, thus, consented for modifying the award in question to that extent, qua back wages.

For the reasons recorded above and also in view of the consent given by Mr. Paul for modifying the award in question qua back wages, this petition is partly allowed.

Award made by the labour court concerned in Old Reference No. 1490 of 1988 (New Number 84 of 1996) dated September, 2000 is quashed and set aside in so far as it relates to back wages for the intervening period without disturbing the award of reinstatement with continuity of service made in favour of the respondent workman. Rule is made absolute in terms indicated hereinabove with no order as to costs.

Learned advocate Mr. Paul appearing for the respondent workman has prayed for issuing some suitable directions directing the petitioner to implement the award in question as modified by this Court within some reasonable period as, according to his submission, the

award made by the Labour Court in September, 2000 has not been implemented till this date and the respondent has not yet been reinstated in service but has been paid wages under section 17-B of the Industrial Disputes Act, 1947.

Considering the submissions made by the learned advocates for the parties, it is directed to the petitioner to reinstate the respondent in service within one month from the date of receipt of copy of this order and to pay full wages to the respondent from September, 2000 till the date of his actual reinstatement in service within two months from the date of receipt of copy of this order, after making adjustment of the amount paid to the respondent workman under section 17-B of the Industrial Disputes Act, 1947.

In view of the above order passed in the main matter, civil application no. 3188 of 2002 shall not survive. Same is, therefore, disposed of with no order as to costs.

Dt.23.4.2002. (H.K. Rathod,J.)
Vyas